

# Health Care and Competition Law and Policy Workshop

Thomas (Tim) Greaney

Professor of Law and Co-Director  
Center for Health Law Studies, Saint Louis University  
[greanetl@slu.edu](mailto:greanetl@slu.edu) [healthcenter/](http://healthcenter/healthcenter/)

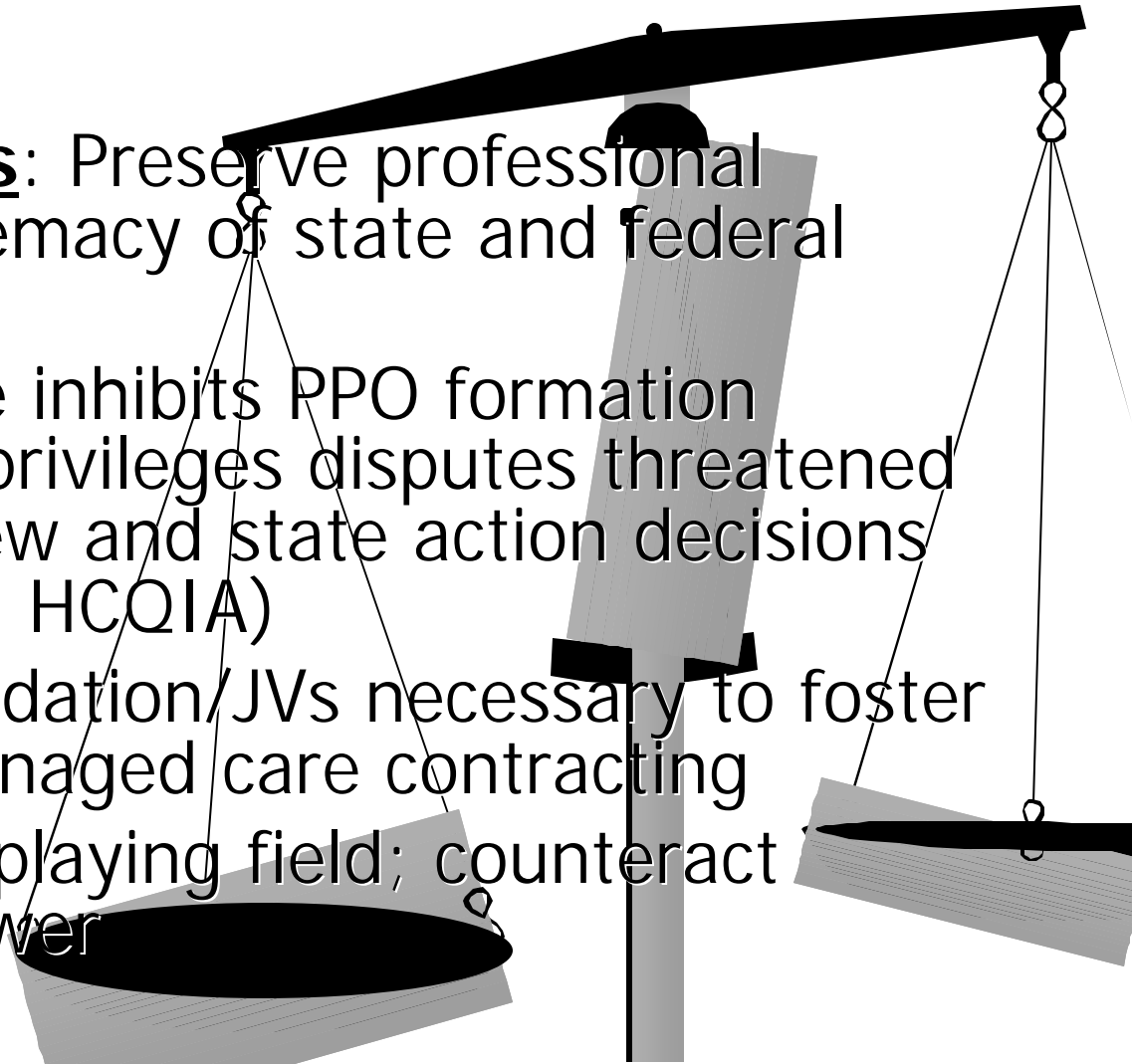
# Rationales for Limiting Antitrust in Health Care

**1970's- early '80's**: Preserve professional sovereignty, supremacy of state and federal regulation

**1980's**: Per se rule inhibits PPO formation (Maricopa); staff privileges disputes threatened quality (peer review and state action decisions (Patrick v. Burget; HCQIA)

**Early '90's**: Consolidation/JVs necessary to foster competition in managed care contracting

**Present**: Level the playing field; counteract managed care power



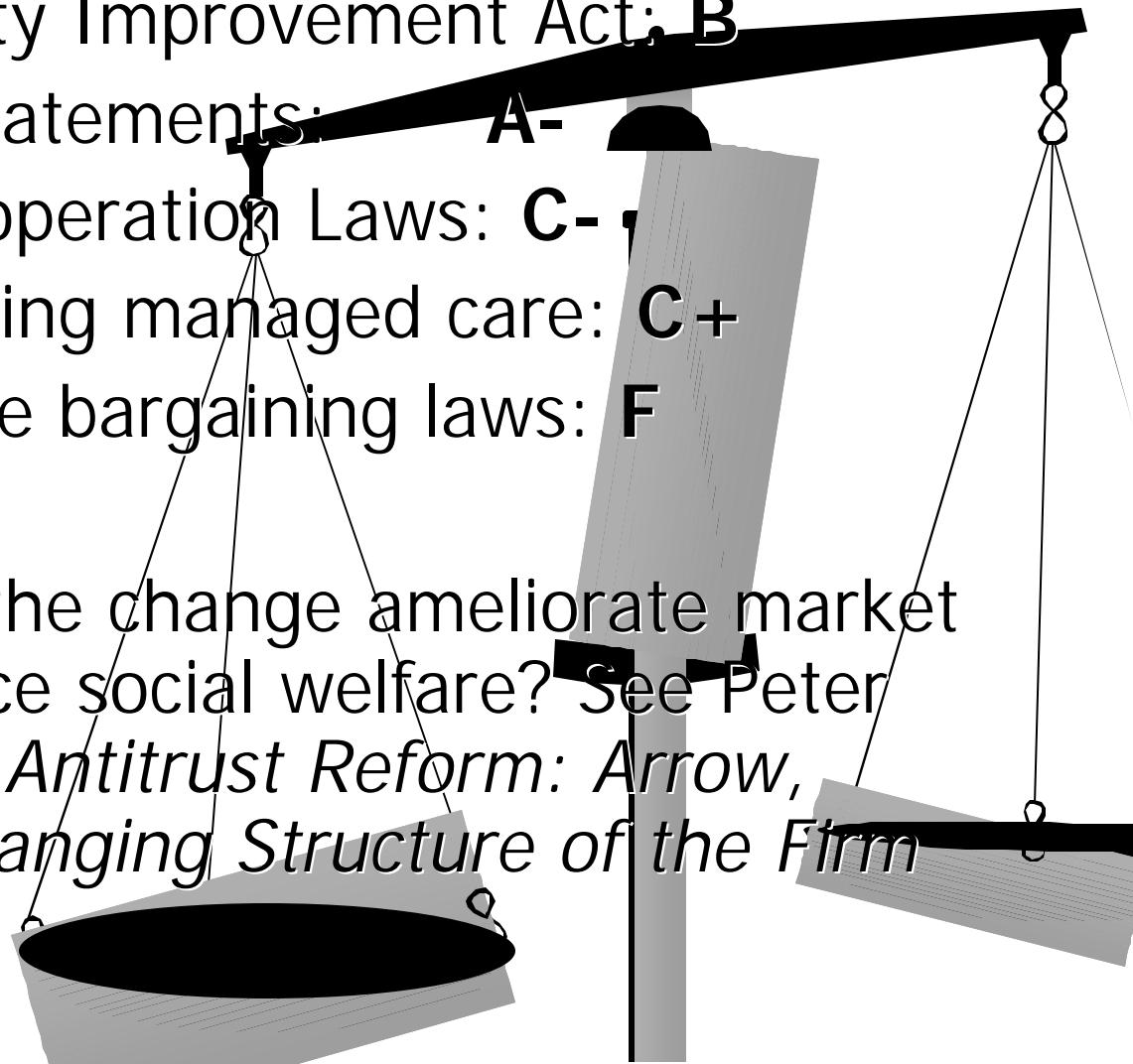
# Legislative/Regulatory Responses

- Health Care Quality Improvement Act
- FTC/DOJ Policy Statements
- State Hospital Cooperation Laws
- State laws regulating managed care
- Physician collective bargaining laws



# Grades

- Health Care Quality Improvement Act: **B**
- FTC/DOJ Policy Statements: **A-**
- State Hospital Cooperation Laws: **C-**
- State laws regulating managed care: **C+**
- Physician collective bargaining laws: **F**
- Grade key: Does the change ameliorate market failure and advance social welfare? See Peter Hammer, *Medical Antitrust Reform: Arrow, Coase and the Changing Structure of the Firm*



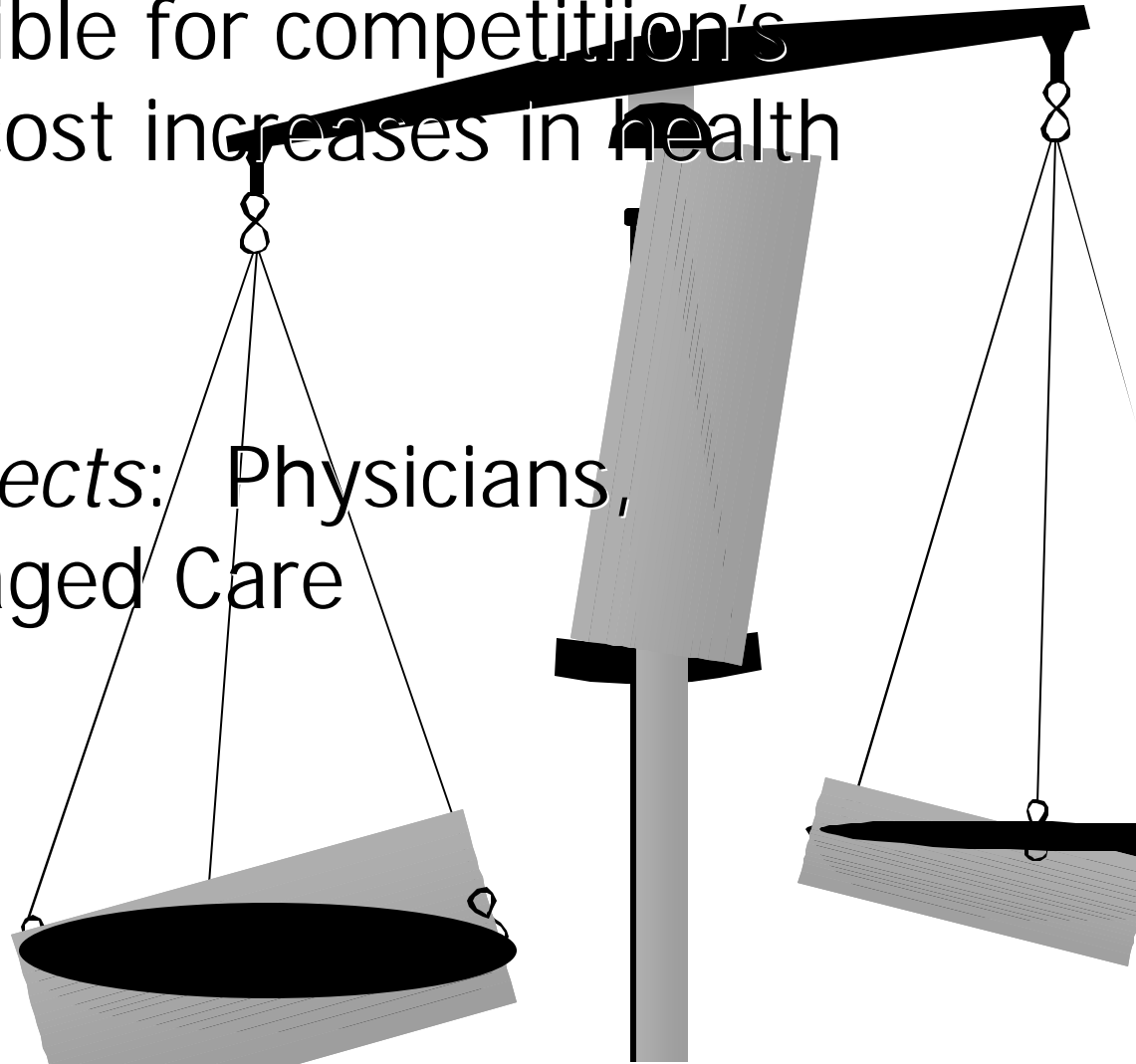
# Antitrust Success stories



- Policy Statements
- Dealing with spurious, opportunistic suits, e.g. staff privileges
- Encouraging integration
- Curbing cartels
- Pharmaceutical Industry cases
- FTC/DOJ staff

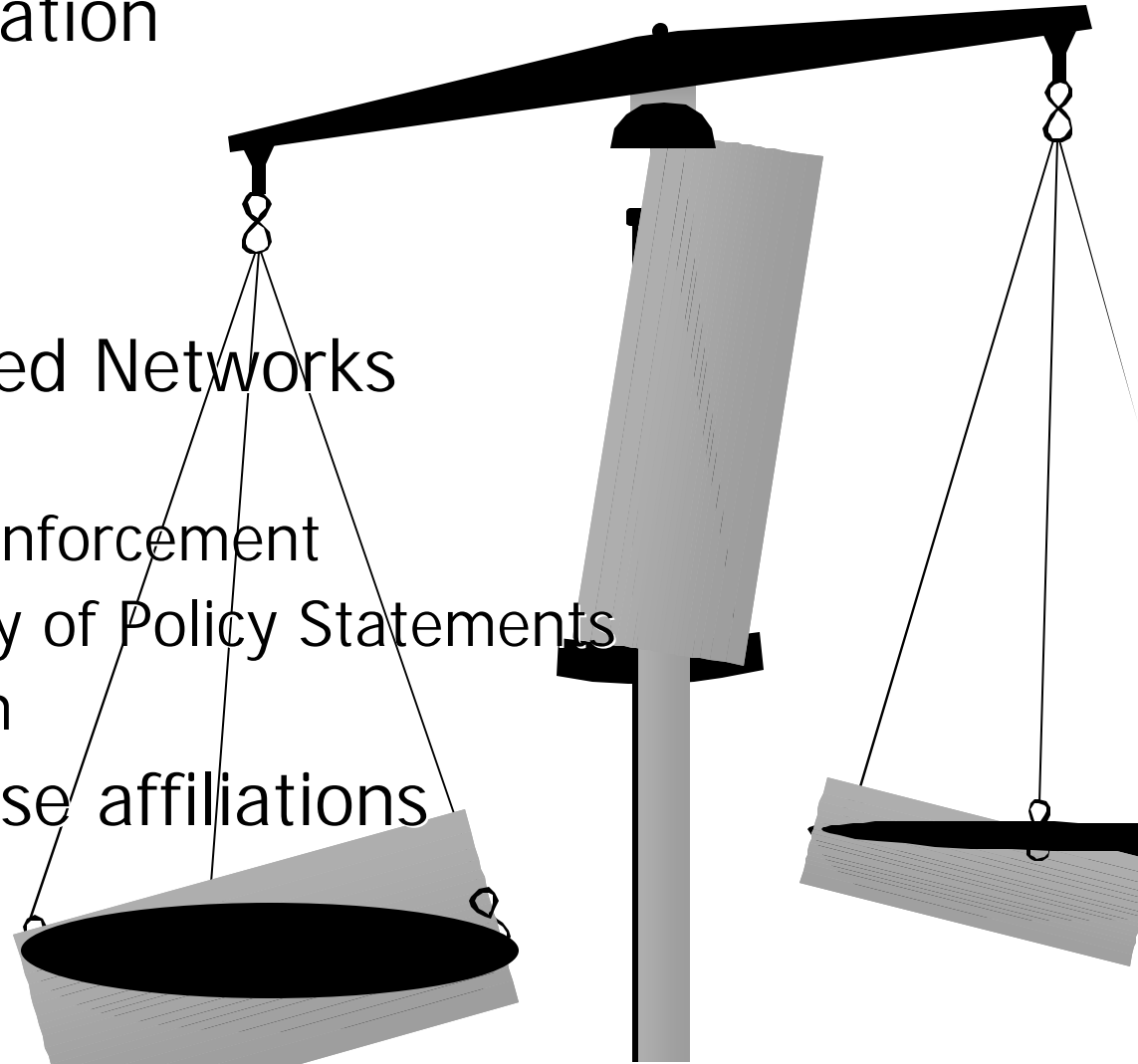
# *Murder on the Orient Express*

- Who is responsible for competition's failure to curb cost increases in health care?
- *The Usual Suspects:* Physicians, Hospitals, Managed Care



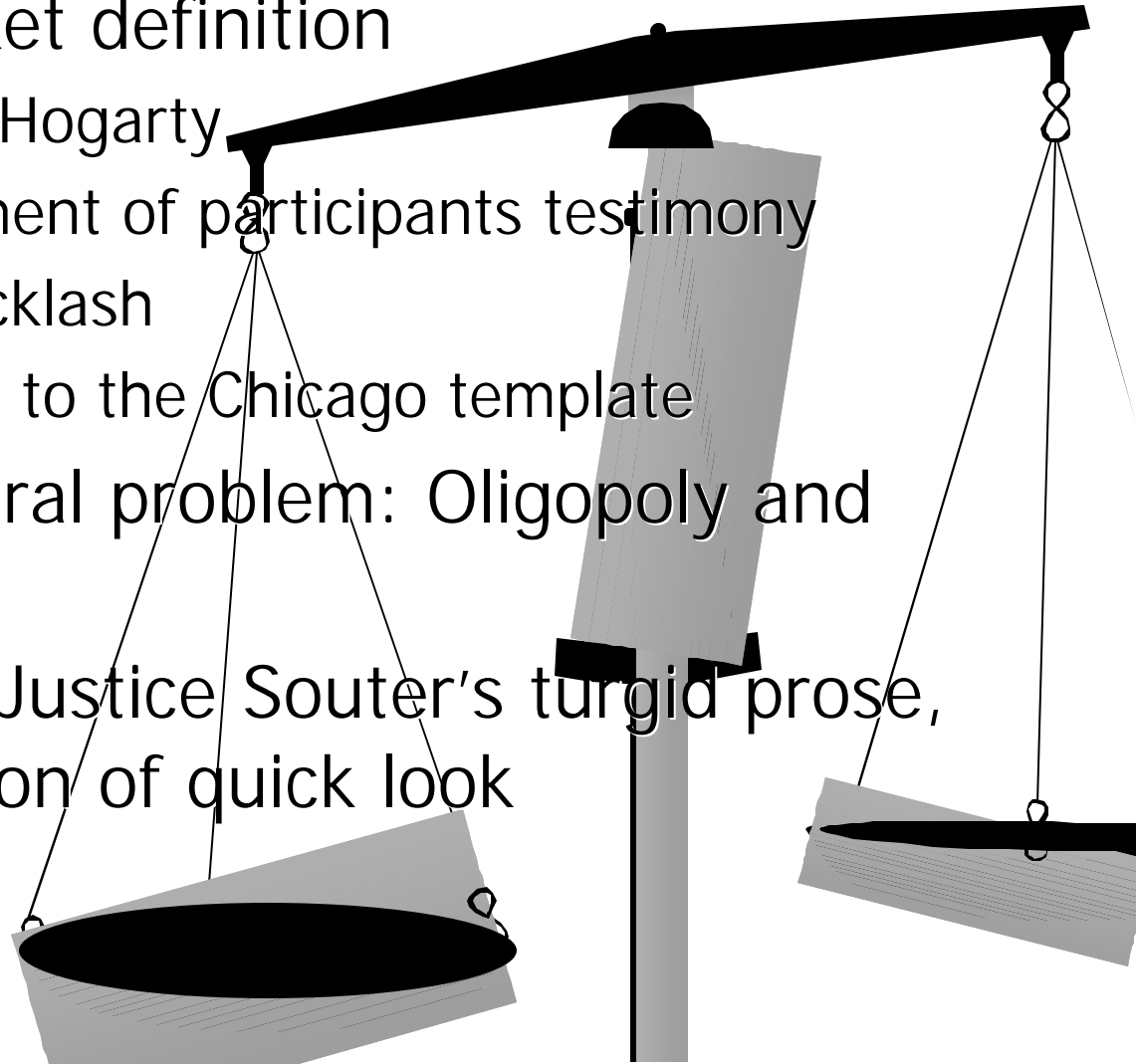
# Government Enforcement Failures

- Provider Concentration
  - Detection
  - Lack of Litigation
  - Case selection
- Physician Controlled Networks
  - Messenger model
  - Lack of Criminal enforcement
  - Dilution of Efficacy of Policy Statements
  - Clinical integration
- Joint ventures/loose affiliations



# Other culprits: The Courts

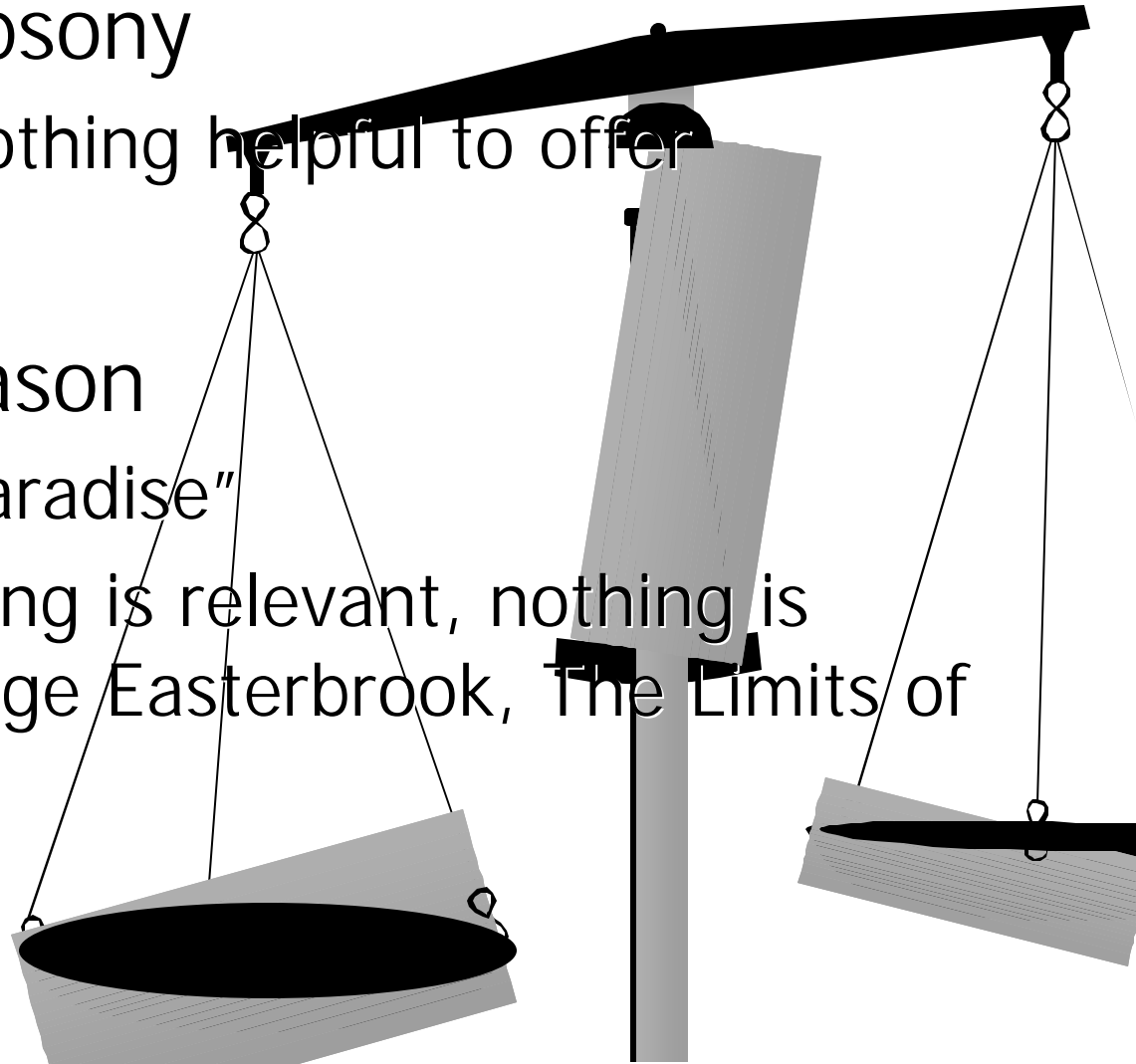
- Mergers and Market definition
  - Misuse of Elzinga Hogarty
  - Evidentiary treatment of participants testimony
  - Managed care backlash
  - Slavish adherence to the Chicago template
- Ignoring the central problem: Oligopoly and Monopsony
- *California Dental*, Justice Souter's turgid prose, and the evisceration of quick look





# Culprit 3: Antitrust Doctrine

- Oligopoly/oligopsony
  - Antitrust has nothing helpful to offer
- Monopsony
- The Rule of Reason
  - "Defendants' paradise"
  - "When everything is relevant, nothing is dispositive" Judge Easterbrook, *The Limits of Antitrust*



# One more suspect: The private bar

Understanding and influencing the silent world of attorney and client

- Do policy statements, speeches, advisory opinions send a sufficient message?
- “Any merger is worth trying”
- Negotiated rules/negotiable conduct



# Whither Antitrust?

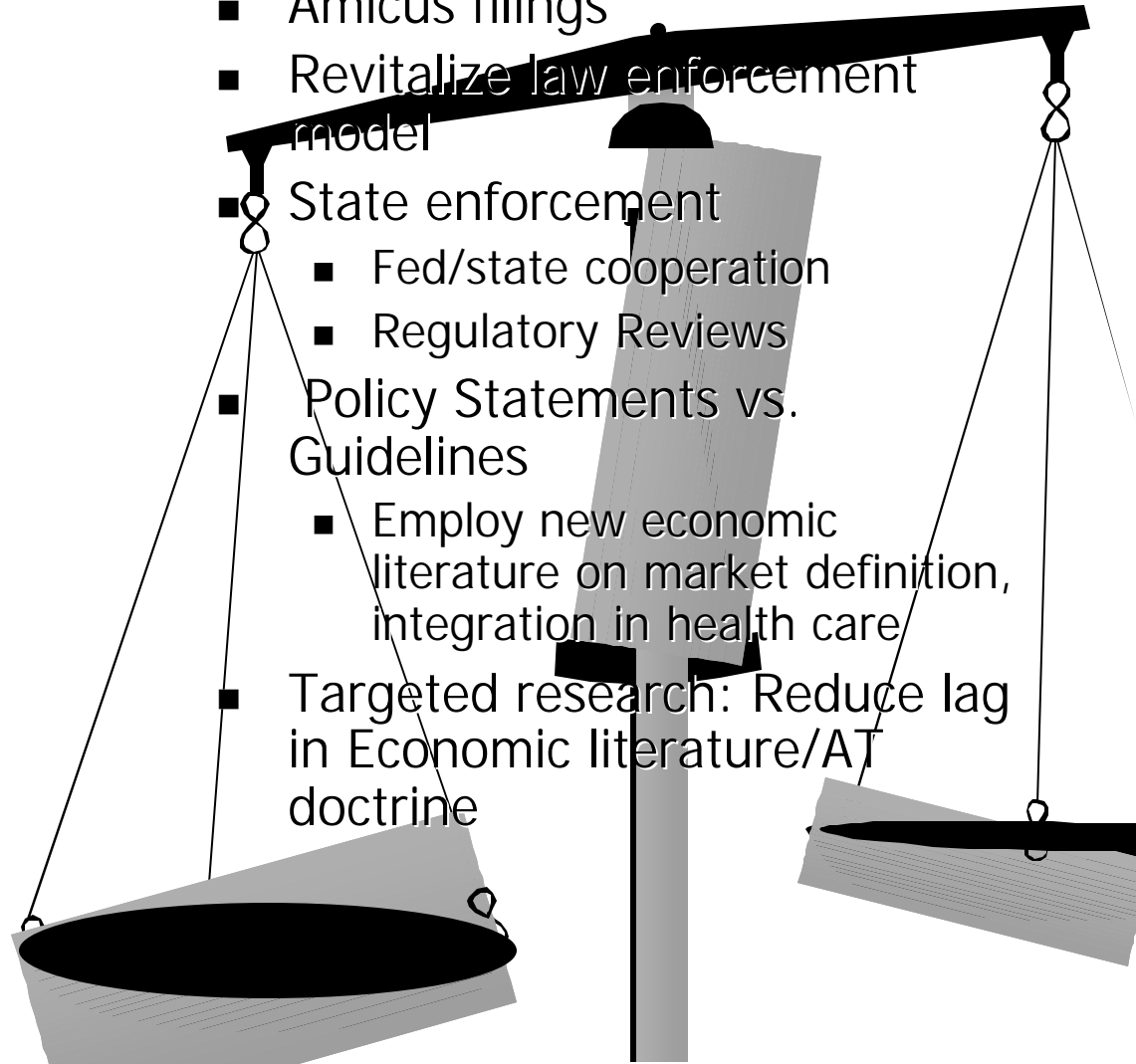
- Concentrated provider markets
  - Hospital-physician disputes, e.g. Hospitals attempting to block physician-sponsored surgicenters
  - Hospital-hospital disputes, e.g. predatory and exclusive contracts with MCOs raising rivals costs and other theories
- Vertically integrated entities: exclusive dealing and other abuses
- Concentrated Managed Care markets
  - More “countervailing” physician networks; “clinically integrated” hospital networks
  - Predation by MCOs with real market power
- Pharma; devices; genomic I.P.



# The road ahead: a dose of trustbusting



- Amicus filings
- Revitalize law enforcement model
- State enforcement
  - Fed/state cooperation
  - Regulatory Reviews
- Policy Statements vs. Guidelines
  - Employ new economic literature on market definition, integration in health care
- Targeted research: Reduce lag in Economic literature/AT doctrine



# Syllabus

- Greaney, *Whither Antitrust? The Uncertain Future of Competition Policy in Health Care*, 21 Health Affairs 185 (March 2002)
- Greaney, *A Perfect Storm on the Sea of Doubt: Physicians, Professionalism and Antitrust*, 14 Loyola Cons. L. Rev. 481 (2002).
- B. Furrow, T. Greaney, et al. HEALTH LAW Treatise ed. (West, 2001) ch. 14.
- Peter Hammer, *Medical Antitrust Reform: Arrow, Coase and the Changing Structure of the Firm*.
- Commissioner Thomas Leary, Saint Louis University School of Law Law Journal, Fall 2002.

